

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 06-0288
Sales/Use Tax
For Tax Years 2003 and 2004

NOTICE: Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

I. Sales/Use Tax—Hotels

Authority: IC § 6-8.1-5-1(b); 45 IAC 15-5-3(b); *Hoogenboom-Nofziger v. State Bd. Of Tax Comm'rs*, 715 N.E.2d 1018 (Ind. Tax Ct. 1999); 45 IAC 2.2-5-25; 45 IAC 2.2-5-24; Information Bulletin #4 (May 2002); IC § 6-2.5-3-7; 45 IAC 2.2-3-25; Information Bulletin #41 (December 2002); IC § 6-9 *et seq.*

Taxpayer protests the proposed assessments of sales/use tax.

II. Tax Administration—Negligence Penalty

Authority: 45 IAC 15-11-2

Taxpayer protests the imposition of a ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer operates a hotel. The Department audited the taxpayer, and the taxpayer protested various items from that audit. An administrative hearing was held, and this Letter of Finding results from that hearing. More facts will be provided below as needed.

I. Sales/Use Tax—Hotels

DISCUSSION

Before examining the taxpayer's protest, it should be noted that the *taxpayer* bears the burden of proof. IC § 6-8.1-5-1(b) states in pertinent part:

The notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed

assessment is wrong rests with the person against whom the proposed assessment is made.

The Indiana Administrative Code also states “[t]he burden of proving that a proposed assessment is incorrect rests with the taxpayer....” 45 IAC 15-5-3(b).

It is also important to note 45 IAC 15-5-3(b)(7), which states the “purpose of the hearing is to *clearly* establish the taxpayer’s *specific* objections to the assessment and *reasoning* for these objections.” (*Emphasis added*).

Also relevant, although a property tax case, is *Hoogenboom-Nofziger v. State Bd. Of Tax Comm’rs*, 715 N.E.2d 1018, 1024 (Ind. Tax Ct. 1999), a case in which the Indiana Tax Court explained that, “State Board hearing officers do not have the duty to make a taxpayer’s case.”

As noted, the taxpayer is in the hotel business, renting rooms to the general public. After an audit, the taxpayer protested the following “disallowed claimed exemptions”:

1. Rooms billed directly to governmental employees that are reimbursed by the government agency.
2. Rooms billed directly to non-profit organizations.
3. Rooms billed to customers who were refunded sales tax collected during the first 30 days of their stay when the customer did not pay for the room on a monthly basis.

1. Governmental Employees Reimbursed

The auditor disallowed the exemption of sales tax for “state and local governmental purchases.” The taxpayer cites to 45 IAC 2.2-5-25 and Information Bulletin #4 in arguing that the rentals are exempt.

45 IAC 2.2-5-25 provides:

- (a) There is not a blanket exemption from the sales tax for purchases by governmental agencies and units. It provides that only the purchase of tangible personal property used by the governmental agency in connection with a governmental function may be purchased exempt from sales tax.
- (b) Purchases by a governmental agency or subdivision to be used in connection with or for a proprietary activity are subject to the sales tax.
- (c) Proprietary activities by governmental agencies and subdivisions include:
 - (1) Activities in connection with the sale of tangible personal property, such as college book stores, food services, concessions, etc.
 - (2) Activities in connection with the rental of tangible personal property made to the general public.
- (d) In every case in which a governmental agency engages in a proprietary type activity as defined above, the agency must pay sales tax on the purchase of all tangible personal property used in connection therewith.

(e) The construction of buildings and structures for use in proprietary activities such as concession stands, is subject to sales tax on the tangible personal property incorporated therein.

(f) Governmental agencies should refer to the gross income tax regulations and instructions for other examples of proprietary type activities.

45 IAC 2.2-5-24, in relevant part, states:

(e) Purchases must be invoiced directly to the governmental entity and paid out of governmental funds. Purchases of tangible personal property, public utility services, and commodities by the state or a subdivision thereof are exempt from gross retail tax, provided the purchases are invoiced directly to the governmental entity and paid for out of government funds. Purchases which are for use by the governmental entity, but which are not invoiced directly to the state or subdivision or are not paid for out of governmental funds, are subject to the gross retail tax.

Information Bulletin #4 (May 2002) also states, "If a State or local employee purchases an item, and even if the employee is to be reimbursed by the governmental entity, the purchase is not exempt, and the employee must pay sales tax at the time of purchase."

The taxpayer's protest on this issue is denied.

2. Rooms Billed Directly to Non-Profit Organizations/Exemption Certificates

The Audit Report states that this issue turns on whether or not lodging for members of a not-for-profit organization can be exempt, noting that Information Bulletin #10 is applicable. The taxpayer argues, in essence, that even if the lodging of the members is taxable, that nonetheless taxpayer was "provided [with] exemption certificates from various non-profit organizations stating that the transaction was exempt from taxation." The taxpayer then cites to IC § 6-2.5-3-7 and 45 IAC 2.2-3-25, stating that, "The statute and regulations provide that [taxpayer] is relieved of responsibility for the collection of tax if a properly executed exemption certificate is provided."

As it relates to the taxpayer, the issue does in fact turn on the exemption certificates. IC § 6-2.5-3-7 states (*Emphasis added*):

(a) A person who acquires tangible personal property from a retail merchant for delivery in Indiana is presumed to have acquired the property for storage, use, or consumption in Indiana, unless the person or the retail merchant can produce evidence to rebut that presumption.

(b) *A retail merchant is not required to produce evidence of nontaxability under subsection (a) if the retail merchant receives from the person who acquired the property an exemption certificate which certifies, in the form prescribed by the department, that the acquisition is exempt from the use tax.*

And 45 IAC 2.2-3-25 says (*Emphasis added*):

The burden of proving the contrary is upon the purchaser. The retail merchant making such a sale shall bear the burden of proving to the contrary also, *unless he receives from the purchaser an exemption certificate.*

Under IC § 6-2.5-3-7(b), the taxpayer received exemption certificates from the non-profit members and is thus relieved from the liability for failure to collect. The taxpayer's protest is sustained subject to Audit verification.

3. Refunded Sales Tax on Room Rentals

The taxpayer states in its brief:

[Taxpayer] does not charge sales tax on customers whose stay is booked for longer than 30 days. If a customer's stay is undetermined, [taxpayer] collects sales tax on the daily room rental for the first 30 days of the stay. When a customer's stay exceeds 30 days and they request a refund of the sales tax previously paid, [taxpayer] will issue a sales tax refund to the customer.

The Audit Report states that,

These sales involve customers that stay for an unknown length of time and pay for the room by the day or the week. Sales tax is collected by the taxpayer on the room rental for the first 30 days. If the customer exceeds 30 days, the taxpayer [] will refund the sales tax collected to their customer and will claim an exemption equal to the refund to the guest.

The Department notes that Information Bulletin #41 (December 2002) provides relevant examples that support the Audit Report (*Emphasis added*):

An accommodation that is rented for thirty (30) days or more is not subject to the sales tax. *The customer is required to pay the tax for the first thirty (30) days if the customer is billed on less than a monthly basis.*

EXAMPLE:

A business rents accommodations for its employees and signs a lease for four months, payable monthly, the first thirty (30) days would not be subject to tax. *Same situation as above; however the business pays the rental on a weekly basis. The business is required to pay sales tax on the first thirty (30) days of rental.*

If an entity rents the rooms for employees, the entity is renting the rooms and not the person who stays in the room. The contract would not have to be for a specific room as long as the continuous stay portion of the contract remains in effect.

The taxpayer is basically arguing that the thirty-first (31st) day has a retroactive tax ripple effect and makes the previously taxable transactions non-taxable. As the emphasized language quoted above shows, the taxpayer is incorrect. The example states that a four month lease, payable monthly, is not subject to tax on the first thirty (30) days, but for a

rental on a weekly basis the sales tax is still required “on the first thirty (30) days of rental.” The taxpayer’s protest is denied.

Finally, the above findings are also findings for—if applicable—any County Innkeepers taxes (*See* IC § 6-9 *et seq.*).

FINDING

Taxpayer’s protests are denied, except for the protest regarding exemption certificates which is sustained subject to Audit verification (subheading #2).

II. Tax Administration—Negligence Penalty

DISCUSSION

Taxpayer protests the imposition of a penalty. With regard to the penalty, the Department refers to 45 IAC 15-11-2(b), which states:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer’s carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

45 IAC 15-11-2(c) provides in pertinent part:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section.

Taxpayer states that it “exercised reasonable care, caution and diligence and has not been careless, thoughtless or inattentive to its duties as an Indiana taxpayer.” Given the fact sensitive nature of the taxpayer’s protest (e.g., room rentals over 30 days), the Department agrees that it was not negligent.

FINDING

Taxpayer's protest is sustained.

DP/BK/DK December 18, 2006